BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEN D. CLARK, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 02-523779** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: August 7, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on December 9, 2005. Brad Parkinson of Idaho Falls represented Claimant. Paul Rippel, also of Idaho Falls, represented Defendant, Industrial Special Indemnity Fund (ISIF). Claimant settled his claims against Employer/Surety prior to hearing, leaving ISIF as the sole Defendant. The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on June 19, 2006 and is now ready for decision.

ISSUES

Pursuant to the Notice of Hearing, the issues to be decided are:

1. Whether Claimant is totally and permanently disabled;
2. Whether ISIF is liable under Idaho Code § 72-332; and
3. Apportionment of liability under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that he sustained a permanent lumbar injury as a result of an industrial accident that occurred on November 6, 2002, which injury combined with his pre-existing psoriatic arthritis and degenerative arthritic changes to his spine so as to render him totally and permanently disabled. Claimant asserts that his total impairment is 61%, of which 11% is attributable to the industrial accident, so liability for his total and permanent disability should be apportioned 18% to Employer/Surety, and 82% to ISIF.

ISIF does not dispute that Claimant sustained a lumbar strain or sprain as a result of the November 6, 2002 industrial accident, but contends that Claimant did not sustain any permanent injury as a result of that industrial accident, thus relieving ISIF of any liability on the claim.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Shirley Rae Clark taken at hearing;

2. Joint Exhibits 1 through 26 admitted at hearing, as supplemented by Exhibit 16B by stipulation of the parties; and

3. Post-hearing depositions of Robert H. Friedman, M.D., and George R. Lyons, M.D.

All objections posed by counsel for ISIF during the post-hearing depositions of Drs. Friedman and Lyons are overruled, with the exception of the objection made at p. 40 of Dr. Lyons' deposition, which is sustained. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 46 years of age, and resided in Albion, Idaho, with his wife and two young daughters.

BEFORE NOVEMBER 6, 2002

2. Claimant graduated from high school in 1978. Notwithstanding his receipt of a high school diploma, Claimant functions at a third-or fourth-grade level in his reading and writing skills, and relies upon his wife for assistance in these areas.

3. Since leaving school, Claimant has worked as a ranch hand, carpenter, metal fabricator, welder, ski lift operator, truck driver and heavy equipment operator. In 1989, Claimant sustained a back injury that took him off work for about six months. When he returned to work following that injury, he returned to doing heavy work in metal fabrication.

4. In 1999, Claimant was working as a metal fabricator. A minor industrial injury led to a cascade of medical problems. Ultimately, Claimant was diagnosed with a septic knee, psoriatic arthritis (PA) and degenerative disc disease (DDD) in his lumbar spine. The PA, when it flared, affected all of Claimant's major joints, including his feet, knees, hips, shoulders, elbows, wrists, and hands. Claimant was unable to tolerate the standard treatments to control (but not cure) PA, and was allergic to all aspirin-based anti-inflammatories, making his PA difficult to treat. Claimant relied upon prednisone to control inflammation and relatively high doses of hydrocodone, a narcotic analgesic, for pain.

5. Following his PA diagnosis, Claimant knew he could not return to the strenuous work of a metal fabricator, and when he recovered from his septic knee, he found employment with Six S Ranch—his employer at the time of his November 2002 injury. The work at Six S

Ranch was significantly less strenuous than his prior work, and primarily involved operating farm machinery.

6. Medical records show that Claimant started complaining about his low back as early as January 2000. Donald G. Pica, M.D., the rheumatologist who treated Claimant following his PA diagnosis, records such complaints in his January 17, 2000 chart note. Dr. Pica mused whether the low back pain was caused by Claimant's PA or was musculoskeletal in origin. The low back pain complaints continue in the chart notes for March 27, 2000 and April 28, 2000. In November 2001, a year prior to the industrial injury that is the subject of this proceeding, Claimant had significant low back pain, which he continued to treat with hydrocodone. In a chart note dated November 2, 2001, John F. Mijer, M.D., observed:

> His low back pain has been controlled relatively well with Lorcet. That is his major complaint. When he is physically active with his job demands his back hurts.

Ex. 20, p. 001. When Claimant returned to Dr. Mijer in February 2002, he reported "severe" low back pain. The doctor was concerned with the amount of hydrocodone that Claimant was using:

> We discussed that I was concerned with the frequent use of Lortab 10. This is a large gentleman. I explained to him the concept to tolerance to narcotics. I explained that it is difficult to write for such high doses and such frequent doses of narcotics and that he may need to discontinue the activity that is causing that problem. He notes that he went from a more physical strenuous job to a lighter job and I explained that he needed to discontinue or decrease the frequency of lifting and that we might not be able to write for so many Lortab.

Id., at p. 005. Claimant admitted at hearing that he missed work on occasion as a result of his low back pain.

7. In late summer of 2002, Six S Ranch advised Claimant that his job would be terminating at the end of the year as a result of management and ownership changes.

ON AND AFTER NOVEMBER 6, 2002

8. On November 6, 2002, Claimant was using a pressure washer to clean an excavator. As he was moving the washer wand from one hand to the other, he squeezed the trigger and it kicked back, causing him to twist, hurting his back.

Medical Care

9. Claimant first sought medical care for his injury on November 11, when he saw his regular physician, Glen E. Page, M.D. Dr. Page diagnosed lumbosacral strain and prescribed physical therapy, hot soaks, muscle relaxant, and hydrocodone. Claimant refused physical therapy and chose to see a chiropractor. Claimant saw H. Eugene Soulsby, D.C., on November 15. Dr. Soulsby diagnosed sprain/strain injury to the cervicothoracic and lumbosacral soft tissue with attendant myofascitis and spasm of the paraspinal musculature. Dr. Soulsby proposed daily treatment for two weeks, followed by three treatments per week for two more weeks, at which time Claimant's condition would be reassessed. Dr. Soulsby took Claimant off work through November 29.

10. Claimant did not return to work at Six S Ranch. He was paid full wages through December 2002 along with severance and vacation pay.

11. Claimant continued to treat with Drs. Page and Soulsby. Dr. Page ordered X-ray and MRI images of Claimant's lumbar spine in early December 2002. The films showed:

> Degenerative disk changes and degenerative changes of facet joints resulting in mild spinal stenosis at L3-4 and L4-5 and mild bilateral neural foraminal narrowing at L3-4, L4-5 and L5-S1.
>
> There is partial lumbarization of S-1 with a small S1-2 intervertebral disk.

Ex. 14, p. 020. Dr. Page referred Claimant to David B. Verst, M.D., a spine specialist, for a consult and/or additional treatment.

12. Dr. Soulsby determined that Claimant had reached maximum medical improvement (MMI) with regard to his lumbar strain/sprain by December 13. The doctor noted that due to Claimant's pre-existing conditions he would need occasional palliative care in the future.

13. Dr. Verst saw Claimant on January 6, 2003. On exam, he noted significantly reduced range of motion, but no neurological involvement. Dr. Verst reviewed the December 2001 MRI, noting "significant degeneration of the disks at L2-3, 3-4, and 4-5. . . . no evidence of spinal cord entrapment centrally laterally and/or involving the foramina." Ex. 12, p. 003. Dr. Verst diagnosed degenerative disk disease at L2-3, 3-4, and 4-5. He opined that it would be best for Claimant to find a different line of work or limit his activities when working for Six S Ranch. He recommended four to six weeks of physical therapy.

14. Claimant returned to Dr. Verst on February 18. He had attended five physical therapy sessions in addition to his initial evaluation. Claimant was unimproved, and Dr. Verst opined that Claimant was medically stationary and stable. Claimant asked for pain management, and Dr. Verst agreed that such treatment was appropriate, referring Claimant to Clinton L. Dillé, M.D.

15. Dr. Dillé saw Claimant on March 6. Claimant described constant back pain that started in the low back but subsequently radiated all the way to the base of his skull, and occasionally down into his right leg and foot, and his left leg to the knee. Nothing controlled the back pain, and it prevented him from doing any work and most of his normal activities and interfered with his sleep. Claimant described the pain level as 10 out of a possible 10 on the visual analog scale. Dr. Dillé diagnosed psoriatic arthritis with a recent flare-up, and "[l]umbar degenerative disk disease with back pain and low back pain with what appears to be a significant

myofascial component . . ." Ex. 13, p. 002. Dr. Dillé noted Dr. Verst's opinion that Claimant's condition was stable, permanent and nonsurgical, but thought a lumbar epidural steroid injection (LESI) might improve Claimant's leg pain and improve his gait. The doctor did not believe that Claimant's other pain complaints could be helped.

16. Claimant had his first LESI April 3. He returned to see Dr. Dillé on April 15. He reported significant improvement in the pain radiating into his right leg. Dr. Dillé planned a second LESI following a return to the clinic the following week. The April 15 chart note is the last recorded office visit to Dr. Dillé. On May 6, Dr. Dillé sent a letter to Claimant's counsel responding to several questions:

> 'Is [Claimant's] condition related to the 11/06/02 incident medically stable?' He has continued pain and disability related to this and has actually responded in a favorable fashion to some injections that I have performed. In this regard, I feel that his medical condition is not stable but I feel that we can continue to improve his condition.

Id., at p. 015. Dr. Dillé further opined that Claimant was not medically stable, that stability could be reached in three to four months, and that an impairment rating and permanent restrictions were premature. Dr. Dillé did recommend an extensive physical therapy program and/or work hardening as a "last effort" to improve Claimant's condition and return him to work.

17. Surety referred Claimant to Dr. Friedman for an independent medical exam (IME). The exam was conducted on July 8, 2003. Claimant described stabbing pain at the base of his neck, his buttocks, and down the back of his right thigh, and an aching pain in his low back and between his shoulder blades. He described his November 6, 2002, accident and fairly summed up his treatment. Claimant advised that he was still seeing Dr. Dillé, and had three LESIs that provided only temporary relief.

18. In addition to taking a patient history, Dr. Friedman reviewed Claimant's medical records, performed a physical exam, and had Claimant complete self-administered tests intended to measure mood disturbance and Claimant's perception of his level of disability. Dr. Friedman's diagnoses included low back pain radiating into the right lower extremity, PA with limited range of motion in shoulders, hips, and spine, and mild to moderate depression.

19. More importantly, Dr. Friedman opined that Claimant's condition was not related to his November 6, 2002 industrial injury, but was due entirely to his PA. Dr. Friedman concluded that no further treatment was necessary as a result of the industrial accident, but that Claimant should be seeing a rheumatologist for long-term management of his PA. Dr. Friedman opined that Claimant had reached maximum medical improvement from his industrial injury by February of 2003, and that Claimant had sustained no permanent impairment as a result of his industrial injury. Finally, Dr. Friedman noted that Claimant's PA would limit him to a medium work level with only occasional stooping, bending, squatting, and climbing; given Claimant's impairments from his PA, together with his literacy deficits, he should qualify for social security disability.

20. In December 2003, Dr. Page completed a Medical Source Statement Concerning the Nature and Severity of an Individual's Physical Impairment, stating that Claimant was unable to work a regular eight-hour day, even at a sedentary level with ad lib positional changes.

21. On October 7, 2004, D. Dean Mayes, MHS, PT, conducted a functional capacity evaluation (FCE) of Claimant at the request of Claimant's counsel. Mr. Mayes reviewed most, but not all, of Claimant's medical records. Notably absent were records from Drs. Pica and Mijer that predated Claimant's industrial injury. Mr. Mayes conducted a number of tests and performed a number of measurements intended to assess Claimant's reflexes, strength, dexterity,

range of motion, and his perception of his disability. Mr. Mayes concluded that Claimant evidenced significant loss of motion in his lower spine, extremely limited lifting ability, and above-average grip strength with fair to poor dexterity. Mr. Mayes commented on the difficulty in rating Claimant's physical function:

> The results of the FCE does not [sic] make it possible to rate Mr. Clark at any particular level of physical function. He is only functional realistically at the waist level. He is not able to do lifting of any consequence because of the condition of his spine and he is not able to lift above shoulder height because of his right shoulder condition. At the waist level, he is functioning at a sedentary/light level. It is not realistic that he could function at this level for any length of time. He is not tolerant to doing anything for any significant period of time, including sitting, standing, and limited even in walking.

Ex. 24, pp. 004-005 (emphasis in original).

22. On November 1 and 2, Claimant participated in a panel IME at the request of Surety. Sitting on the panel were Eric F. Holt, M.D., a psychiatrist, George Lyons, M.D., a neurologist, and Michael Phillips, M.D., an orthopedic surgeon. Dr. Holt completed his psychiatric and pain evaluation at his office on November 1. All three panelists attended the completion of the IME on November 2. Dr. Lyons prepared a report on behalf of the panel dated November 2, 2004. Included as part of the report was a separate report prepared by Dr. Holt, dated November 8, and a lengthy summary of the medical records that were provided to the panel.

23. Dr. Holt had the Claimant complete a number of standardized tests, observed the Claimant over the course of the day, and spoke extensively with him about his injury and its effect on Claimant's life. Dr. Holt's analysis of the test battery indicated that while Claimant might have been overly focused on his illness and might have a tendency to dramatize or exaggerate his condition, he had not sustained a psychiatric impairment or disorder as a result of his industrial accident. As Dr. Holt noted:

> He does have episodes of discouragement, and irritability with feelings of depression secondary to his psoriatic arthritic ongoing degenerative problem. This has caused a major lifestyle change for him. The outlook for him is that he will not be able to engage in the activities that he formerly enjoyed when he was younger secondary to his ongoing arthritic process.

Ex. 23, p. 010.

24. The panel took a patient history, examined Claimant, and reviewed the medical records. The panel offered the following conclusions:

> 1) Current diagnoses include: Lumbosacral sprain, thoracic strain, degenerative disk disease in the lumbar spine, psoriatic arthritis, dependent personality traits, probably dyslexia, and narcotic dependence.
>
> 2) The panel does not believe that [Claimant's] current complaints are a direct result of the November 2002 injury.
>
> 3) The panel believes that no further treatment is recommended on the basis of his industrial injury. On a nonindustrial basis, we would recommend that he follow up with rheumatology and be placed on a program to taper his narcotic usage.
>
> 4) The panel believes that [Claimant] is medically stable. We do not believe that he sustained any permanent partial impairment as a result of the 11/06/02 injury.
>
> 5) Work restrictions will be based on his psoriatic arthritis and degenerative disk disease. We recommend bending and stooping on a less-than-frequent basis. He can lift up to 50 lbs occasionally and 25 lbs frequently.

Ex. 25, pp. 004-005.

25. Counsel for Claimant referred Claimant to Rex E. Head, M.D., for an IME that was conducted on November 1, 2005. As she had done in the past, Claimant's wife accompanied him to the examination. The IME report does not indicate whether Claimant's wife assisted her husband with the self-administered testing that was done. Dr. Head took a history, which was substantially consistent with Claimant's recorded medical history, and had Claimant complete a number of self-administered tests. Dr. Head reviewed Claimant's medical records, which appeared to be complete. He also examined Claimant, testing range of motion, reflexes,

and sensation. Dr. Head concluded that Claimant did have PA, gouty arthritis, degenerative disk disease and depression. Dr. Head's conclusions are consistent with all of the other providers who examined him:

> It is my professional opinion that Mr. Clark is at maximal medical improvement. It is unlikely that his back and joint problems will improve. They are, in fact, likely to worsen gradually with time. His overall personal outlook, however, may improve with management of his depression.

Ex. 26, p. 013.

26. Dr. Head calculated a whole-person impairment rating for Claimant of 61% using the combined values from *Guides to the Evaluation of Permanent Impairment*, 5th Ed. (AMA Guides), p. 604. This included the following impairments:

Lumbar spine	21%
Cervical spine	16%
Right upper extremity	16%
Left upper extremity	15%
Left lower extremity	9%
Right lower extremity	8%
Thoracic spine	2%

Dr. Head apportioned two-thirds of the 21% low back impairment to pre-existing conditions and one-third to the November 2002 accident, for a total of 7% PPI for the low back attributable to the industrial injury. Dr. Head apportioned 90% of the remaining 40% whole person impairment (upper spine and other joints) to his pre-existing PA, and 10% to his decreased activity secondary to his industrial injury, for a total of 4% PPI for the secondary effects of the industrial injury. Thus, of Claimant's 61% whole person impairment, Dr. Head found 11% was either the direct result of the industrial injury or a natural consequence thereof.

27. Dr. Head identified the following physical restrictions: lifting 40 lbs rarely if at ground level and infrequently if the item is at least 18 inches high and does not need to be lifted above shoulder height; infrequent kneeling, bending, and stooping; frequent walking and

standing. Dr. Head also noted that the arthritis in Claimant's hands limited his fine motor control, and that his learning disability precluded him from most sedentary jobs requiring anything more than minimal reading and writing.

Vocational Evidence

28. Claimant retained Nancy J. Collins, Ph.D., to perform a vocational assessment and render an opinion as to Claimant's employability and vocational disability. Ms. Collins' report is dated July 27, 2004. Ms. Collins reviewed all of the medical records extant at the time of her report. She interviewed the Claimant on July 22, 2004, and utilized a variety of vocational references and software in reaching her conclusions. Dr. Clark concluded:

> Based on my interview with [Claimant], all of the existing medical information, his stated learning difficulties and reading and math levels, I do not think he is employable in any well-known branch of any labor market. He was academically and vocationally limited prior to his industrial injury, but his back limitations combined with his shoulder and knee limitations render him virtually unemployable.

Ex. 9, p. 008.

DISCUSSION AND FURTHER FINDINGS

DISABILITY

29. For workers' compensation purposes, total disability means an inability to sell one's services in a competitive market. Appropriate considerations in making such a finding include both medical and non-medical factors, such as age, gender, education, training, usable skills, and economic and social environment. *Hamilton v. Ted Beamis Logging & Const.,* 127 Idaho 221, 899 P.2d 434 (1995). There are two ways to prove total and permanent disability.

> First, a claimant may prove a total and permanent disability if his or her medical impairment *together with the nonmedical factors* total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been

> established at that stage. See *Hegel v. Kuhlman Bros., Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd lot doctrine").

Boley v. State, Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997) (emphasis added). When a claimant cannot establish total and permanent disability in the manner described in *Boley*, he may attempt to do so through the odd lot doctrine. An employee is disabled under the odd lot doctrine if he proves that, while he is physically able to perform some work, he is so handicapped that he would not be employed regularly in any well-known branch of the labor market absent a business boom, sympathy of a particular employer or friends, temporary good luck, or superhuman effort on his part. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). An employee may prove total disability under the odd lot worker doctrine in one of three ways:

> (1) by showing that he has attempted other types of employment without success;
>
> (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or,
>
> (3) by showing that any efforts to find suitable employment would be futile.

Hamilton, 127 Idaho at 224, 899 P.2d at 437 (Citations omitted).

30. Although total and permanent disability was identified as an issue at the outset of this proceeding, a careful analysis of the respective positions of the parties suggests that, at bottom, there is no real dispute that Claimant cannot sell his labor in a competitive market. Claimant's numerous medical conditions, including his degenerative disc disease, his PA, and his problems with his shoulder, taken together with his limited vocational skills, the rural area in which he lives, his undisputed learning difficulties, and his poor math and reading skills, all support a finding that Claimant is totally and permanently disabled. While the Referee believes

that the analysis could end there, Claimant did argue the odd lot doctrine in his brief. Nancy Collins opined that Claimant was not regularly employable in any well-known branch of his labor market, thus making it futile for him to look for work. Dr. Collin's opinion was supported by the record and was not challenged by Defendant. Thus, the Referee finds that Claimant has established his status as totally and permanently disabled under either method as set out by the Idaho Supreme Court.

ISIF LIABILITY

31. The determination that Claimant is totally and permanently disabled necessarily leads to the real issue in this dispute—whether ISIF is liable for a portion of Claimant's total disability income benefits. Under Idaho Code § 72-332, ISIF pays a portion of income benefits for workers who have pre-existing impairments, then sustain a permanent injury in a subsequent industrial accident, and where the combination of the pre-existing impairment and the subsequent injury combine to render the worker totally and permanently disabled. This provision encourages the employment of individuals with pre-existing impairments by relieving their current employer from 100% of the liability in the event the worker becomes totally and permanently disabled as a result of an industrial accident with the last employer.

32. There are four requirements that must be met in order for a claimant to establish ISIF liability under Idaho Code § 72-332.

1. There must be a pre-existing impairment.
2. The impairment must be manifest.
3. The impairment must constitute a subjective hindrance to employment.
4. The impairment must combine with the subsequent injury, to cause total permanent disability.

Dumaw v. J. L. Norton Logging, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990).

Defendant asserts that Claimant's case for ISIF liability fails even before getting to the four elements described above because the injury that Claimant sustained on November 6, 2002 did not result in any *permanent physical impairment*. Rather, Claimant sustained a lumbar strain or sprain as a result of the industrial accident that was symptomatic for a period of time, but did not permanently worsen Claimant's pre-existing degenerative conditions. Defendants rely on the opinions of Drs. Friedman, Lyons, Holt, Phillips, and Page in support of their position.

Claimant argues that ISIF is liable, and relies upon the testimony of Claimant and the opinions of Drs. Verst and Head, and Dean Mayes, the physical therapist who performed the FCE of Claimant. Dr. Verst gave Claimant 2% whole person impairment attributable to the November 2002 injury for his low back. Dr. Head gave Claimant 11% whole person impairment attributable to the November 2002 injury. A portion of that 11% was for his low back, with the remainder relating to other parts of his back and major joints because of the inactivity that resulted indirectly from the November 2002 injury. Mr. Mayes also opined that Claimant could work before the November 2002 accident, and could not work after the accident, which led him to believe that Claimant sustained a permanent impairment as a result of the accident.

33. On the record before her, the Referee cannot find that the "combines with" prong of Idaho Code § 72-332 has been met so as to impose liability on ISIF. First, notwithstanding the impairment ratings assigned by Drs. Verst and Head, the Referee is not convinced that Claimant actually sustained any permanent injury as a result of his industrial accident. Second, there is substantial credible evidence in the record to support a finding that Claimant was an odd lot worker even before the November 2002 industrial accident.

Permanent Injury

34. Dr. Verst's opinion regarding Claimant's impairment attributable to the

November 2002 industrial accident is so lacking in foundation that it is irrelevant. First, although Dr. Verst found no evidence of acute injury or objectively identifiable pathology indicating any nerve root impingement in Claimant's lumbar spine, he concluded that the November 2002 industrial injury increased Claimant's back pain. This conclusion is based primarily on subjective information supplied from the Claimant himself, and is contradicted by the medical records. The medical records of Drs. Pica and Mijer show that Claimant had been missing work, complaining about his low back, and relying on heavy doses of narcotic pain medication for at least two years prior to the industrial accident. Dr. Mijer warned Claimant about his narcotic use and advised him to seek less strenuous employment. Claimant repeatedly stated during his testimony that the reason he couldn't work was because of his feet, knees, hands, elbows, wrists, shoulders, and back. Despite his best efforts, Claimant's counsel was unable to elicit a clear statement from Claimant that it was his low back that prevented his return to work after the November 2002 accident.

A second, but equally serious failing of Dr. Verst's impairment rating and apportionment is that it includes none of the indicia necessary to evaluate its validity. Dr. Verst does not specify what, if any, methodology he used to determine Claimant's 5% whole person impairment. The opinion includes neither data from range of motion studies, nor citation to a diagnosis-related estimate based on the *AMA Guides*. Dr. Verst was not deposed, so his medical records must speak for themselves. As to a methodology and rationale for his rating and apportionment, the medical records are silent.

35. Dr. Head's opinion on impairment and apportionment is equally problematic. Although he apportioned impairment to the November 2002 industrial accident, he neglected to identify the permanent injury that was caused by the accident that forms the basis for such an

award. Under the Idaho workers' compensation scheme, there must be a permanent injury. As to his low back, Claimant had degenerative disc disease long before his industrial injury as documented by imaging done as early as 1999. Imaging done after the accident shows the continued degeneration of Claimant's lumbar spine, but evidences no new or acute injury. Dr. Head also assigned permanent impairment to Claimant's shoulder and all of his other major joints as a result of the November 2002 accident. Yet, there is no evidence in the medical records that the industrial accident resulted in any permanent physical injury that affected Claimant's pre-existing PA or shoulder problems in any way.

Odd Lot Worker

36. Mr. Mayes is not qualified to determine causation. Even if he were, his opinion is based upon subjective and sometimes inaccurate information and assumes a temporal connection that is not supported by the record.

37. There is substantial credible evidence in the record to support a finding that Claimant was an odd lot worker even before the November 2002 industrial accident. Reviewing the various restrictions imposed by Drs. Friedman, Verst, Head, Lyons, Phillips, and Page, it is striking to note that from a functional standpoint, the restrictions were just as applicable to Claimant *before* his November 2002 industrial accident as they were afterward. In other words, all of the things that made Claimant unemployable after the accident also pre-existed the accident. There is no objective medical evidence that the accident made anything worse or permanently aggravated any of his pre-existing medical conditions. Had the accident not occurred and had Claimant finished out the year with Employer and then been laid off, he would still have been virtually unemployable except as an odd lot worker.

CONCLUSIONS OF LAW

1. Claimant is totally and permanently disabled.

2. ISIF is not liable for any portion of Claimant's total and permanent disability pursuant to Idaho Code § 72-332.

3. Since there is no finding of liability on the part of ISIF, the issue of apportionment under *Carey* is moot.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 26 day of July, 2006.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of August, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

BRAD D PARKINSON
PO BOX 1645
IDAHO FALLS ID 83403-1645

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

djb /s/_____